

I. Introduction

This guide describes a case-management and budgeting process for capital habeas corpus cases in federal district courts in the Ninth Circuit. The information provided herein will benefit judges and court staff unfamiliar with case-management and budgeting aspects of the federal capital habeas corpus process. This guide is intended as an introduction to the subject; judges are urged to consult with their district's capital case staff attorney for detailed information. Additional information is also available from the Ninth Circuit Intranet sites, the Ninth Circuit CJA Oversight Committee, and the Office of the Circuit Executive.

The case-management and budgeting process is intended to ensure continuing court supervision of capital habeas cases and to control costs by using the following procedures:

1. dividing cases into four logical phases for which budgets can be developed;
2. requiring counsel to submit to the assigned district judge a case-management plan and budget for each phase in advance of commencing work on that phase;
3. using a special budget preparation program, which serves as a planning and monitoring tool for lawyers and a management tool for the court;
4. conducting case-management conferences when appropriate, to manage the proceedings and resolve budget issues; and
5. establishing firm deadlines, governing completion of the activities contemplated for each phase.

Early and continuous judicial case management, based on realistic yet firm deadlines, will conserve judicial resources by creating realistic expectations on the part of counsel and by reducing time spent on contentious procedural issues.

The automated case-management and budgeting program contains forms to be used by counsel in preparing for each phase of the case. The phases are

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| Phase I | Appointment, Record Review, and Preliminary Investigation |
| Phase II | Petition Preparation |
| Phase III | Exhaustion, Motion for Evidentiary Hearing, and Briefing of Claims |
| Phase IV | Discovery, Evidentiary Hearing, and Final Briefing |

The automated forms provide categories of activities designed to assist counsel in planning their work and developing a budget, keeping track of expended hours and hours left to use, and completing the vouchers. The program will also assist the court in evaluating budgets and vouchers submitted.

During each budget phase, petitioner's counsel should provide the court with supporting declarations discussing the time proposed in each category itemized on the budget forms, generally indicating how counsel developed time estimates. Declarations should include an explanation of issues only as they specifically relate to budgeting needs. Argument is not permissible and counsel will not be compensated for time expended for such argument. The budget should reflect the total

attorney time required, as well as time for paralegals, investigators, and experts, if applicable. In addition, the identities and qualifications of proposed investigators and experts should be set forth in the supporting declarations. The categories on the budgeting worksheets are designed to facilitate realistic contemplation of the tasks required in most cases. As the case progresses through each case-management phase, the court should be attentive to the established budgets and whether appointed counsel are litigating the case within the prescribed budget. Budgets should be submitted under seal and should be viewed only by the court, the assigned court staff attorney, and counsel for the petitioner; none of the budgeting documents are served on the attorney general.

Each phase should be closed out when the work for that phase is completed. Hours and expenditures should not be carried over to the next phase. Rather, a new budget for the appropriate phase should be developed by counsel and approved by the court. In addition, counsel should not be allowed to exceed the established budget during any phase without first submitting a motion to amend the budget.

The budgeting programs for each of the four phases can be viewed and downloaded from the Web sites of each district court. Sample declarations and sample orders also may be found on the courts' Web sites.

II. Commencement of the Case

The federal capital habeas corpus process typically is initiated by a request for stay of execution, a request for leave to proceed in forma pauperis, and a request for appointment of counsel. In some jurisdictions, the case is commenced by the filing of a preliminary petition. The case is assigned to a district judge and the initial review is completed by a capital case staff attorney.

Following review of the initial pleadings, the court will issue an order staying execution (if necessary), evaluate the petitioner's request to proceed in forma pauperis, and appoint counsel. Appointed counsel are selected according to the local rules or standing orders for the particular district. Designation of counsel within 10 days is preferable, although the actual time may depend on the availability of attorneys. It is expected that lead counsel will be appointed from an established list of lawyers who are experienced in federal capital habeas practice and who meet specified criteria. Use of co-counsel is not presumed; if the court finds second counsel is necessary, a district judge may request justification of such counsel's hourly rate (*see* Optional Rate Justification Worksheet for co-counsel [omitted]). Use of co-counsel may be desirable to help develop a pool of lawyers qualified on death penalty habeas cases and because of the time these cases tend to take until they are completed. While appointing co-counsel may result in more efficient litigation of the case (in terms of development of federal claims and supporting evidence), care must be taken to ensure that counsel do not duplicate efforts and that billing for conference time is prudently limited.

The process described in this guide is for the first federal capital habeas corpus petition filed in the case. It assumes that the assigned judge will manage the case from inception, including scheduling and conducting the initial case-management conference (CMC) and all subsequent CMCs.

The court should send an order to counsel that may, if deemed necessary, schedule a CMC with the assigned judge on a date within 20 days of counsel's appointment. If a CMC is not scheduled, the order should advise counsel of applicable court policies, the hourly rates for counsel, and

voucher requirements. It may also suggest that counsel interview petitioner promptly, prior to the CMC (if one is scheduled), and may serve to advise prior counsel, if any, of the need to provide petitioner's case files (or copies thereof) within 30 days. The court may at this time authorize necessary travel expenses for the initial interview with petitioner.

Counsel should complete a case-evaluation form as fully as possible prior to the initial CMC; the court may request subsequent updates to the form as more information becomes available. Counsel should be advised to arrive at the CMC prepared to discuss the time needed to assemble the record and files, as well as the date by which the petition must be filed, as required by the applicable statute of limitations.

III. Budget and Management Phases

Phase I: Appointment, Record Review, and Preliminary Investigation

Phase I may begin with a CMC, at which counsel for the petitioner and the attorney general should be present. All CMCs should be conducted on the record. Any ex parte proceeding, communication, or request made after a showing of the need for confidentiality must be transcribed and made a part of the record available for appellate review. 21 U.S.C. § 848(q)(9).

The conference provides an opportunity for a preliminary evaluation of case complexity. The presiding district judge may consider a review of the case and preparation of a memorandum by a capital case staff attorney to provide the judge with a solid understanding of the case.

During this CMC, the court and attorneys representing both sides will discuss a potential timetable and determine how much time will be needed to assemble the case record. Counsel should estimate the time needed for assembling the record based on information provided by prior counsel, and may want to enlist the assistance of the attorney general in gathering the record. The court should encourage counsel's use of paralegals whenever appropriate, but particularly in the record-gathering stage.

To ensure that the case proceeds in a timely manner, the judge will set appropriate deadlines, keeping in mind that the size of the record and difficulties in obtaining the record will influence these deadlines. The judge may recommend that

1. the Attorney General deliver the full state court record to counsel within 30 days, or some other reasonable time following the CMC;¹
2. prior counsel supply the case files within 30 days; and
3. counsel complete the assembly and preliminary assessment of the record within 30 days, or other reasonable time following the receipt of files and records.

Once the case-management issues are resolved, the court will excuse the attorney general from the CMC so that the court can focus on budgeting with petitioner's counsel. Because it involves matters of strategy and witness development, the creation of a budget should be a confidential proceeding involving only the judge, court staff, and counsel for the petitioner. This information is essential to the court's assessment of an appropriate budget, and, as such, disclosure to the Attorney General would be improper. The confidentiality surrounding the creation of a budget does not

1. Not all districts have a specific time requirement for the production of the record.

differ from how courts treated funding applications for investigators and expert services in the past. Under 21 U.S.C. § 848(q)(9), as amended by the AEDPA, applications for funding may be considered on an ex parte basis only in cases where petitioners have made a proper showing of the need for confidentiality. The need for confidentiality is generally established in the budgeting process because such applications disclose matters protected by the attorney-client or work-product privileges. *See, e.g.*, Fed. R. Civ. P. 26(b)(3); *United States v. Sanders*, 459 F.2d 1001, 1002 (9th Cir. 1972) (funding statutes designed to put indigent defendants in same position as those who can afford counsel).

During the budget portion of the CMC, the court may authorize interim expenditures for investigators and paralegals and advise counsel of the approved hourly rates for those individuals. All expenditures will require court approval. The court should use this opportunity to again encourage counsel to tier staff responsibilities to lower-rate personnel whenever practical. Attorneys will be compensated for budget preparation because it is considered to be a component of case management.

The court should schedule a due date for a case-management plan and budget for Phase I if a plan has not already been submitted. The Phase I budget should be submitted as soon as counsel has assembled the files and record and can estimate the time needed for review (within 30-60 days of counsel's appointment).² The presumptive guideline for reading the record and taking notes from the record is 60 pages per hour, which will assist counsel in developing a time estimate for this task.

After this CMC, the judge will issue two case-management orders, one filed under seal and addressed only to petitioner's counsel and one filed publicly, addressed to all parties. The publicly filed order should contain significant dates on which the parties agree, including the expiration of the statute of limitations, when the attorney general can (or is directed to) lodge the state record with the court (if applicable), the date for the culmination of Phase I, and the date set for the next CMC, if any, as well as any other matters or decisions made at the conference. Counsel should be directed to notify the court of delays in receiving the files; if prior counsel fails to cooperate, a *subpoena duces tecum* may be issued.

The order filed under seal should record the deadlines set for the presentation of the budget for Phase I, if it has not already been presented, and the billing rates for investigators and paralegals to be retained by petitioner's counsel, if not already conveyed in a prior order. If a Phase I budget has already been submitted, an explanation of the approved budget should be included in this order.

District guidelines may establish time frames for the approval of budgets. The court should approve the budget promptly and set any deadlines that would help to control costs and ensure progress in the case. Court approval of the budget will serve as authorization for all expenditures. Counsel should be cautioned not to exceed the authorized budget without first seeking an amendment and should be warned that exceeding the budget without prior court approval could result in the denial of the unauthorized expenditures. The court may exclude certain requests from the current

2. The judge may also wish to schedule tentative due dates for Phases II and III. The Phase II budget should be submitted upon completion of record review, when counsel can estimate the time needed to prepare the substantive habeas petition (within 60-90 days of counsel's appointment). If another CMC is scheduled, the proposed Phase II budget should be submitted at least one week prior to the date set for that CMC. The Phase III budget should be submitted within 20 days of the filing of the Attorney General's answer or other responsive pleading, though petitioner may request additional time if needed.

budget and require further support (by declaration of counsel) for possible future approval, especially related to experts. If budget revisions are necessary, district guidelines may establish a time limit for court approval of the revised budget.

Vouchers should be submitted at least every 60 days or in accordance with the schedule established in the order appointing counsel, as established by the district court's general orders, or established during the initial CMC. Timely submission of vouchers should be enforced. All services for a time period should be submitted at the same time (e.g., expenses, paralegal time, attorney time) according to voucher procedures outlined in an appropriate order.

As Phase I concludes, counsel should have completed the initial review of all available records and may have conducted a preliminary investigation of petitioner's competence to proceed with federal litigation. Based on client contact and family interviews, counsel should, if appropriate, update the case evaluation form. Counsel should prepare the Phase II budget and submit the budget and supporting declarations prior to the next CMC, if one is scheduled, or by the due date set by the court. Counsel should note that the case-management and budgeting forms for Phase II include entries for time and expenses of investigators and experts, and counsel may need to consult with those individuals to provide the court with enough information to evaluate the need for such resources.

Phase II: Preparation of the Petition

If a case-management conference is held at the beginning of Phase II, the court will create a timetable for the litigation, determine the scope of necessary legal research to be undertaken by counsel, and approve a budget that will help control expenditures. Counsel should submit the Phase II budget and supporting declarations at least one week prior to the CMC. To assist the court in continuing to evaluate the complexity of the case, the court may request that counsel provide an updated case-evaluation form.

Counsel for both parties should be present for the discussion of the litigation timetable and setting of deadlines for filing the petition and responsive pleading. The petition must be filed within the time limits required by the statute of limitations. Considering this limitation, the court should discuss with counsel for both parties how much time will be required to prepare the petition and responsive pleading and should tightly control continuances and deadline extensions. The court will explore with both parties the tasks required, how such activities will be accomplished, and any other relevant issues.

The court will also discuss with counsel whether experts are needed, the number of investigator hours needed, and any travel requirements for experts, investigators, and counsel. The court should establish the maximum hourly rates for experts within the policy adopted by the Judicial Council. Counsel will be required to justify rates that exceed the presumptive maximums. While the court may provisionally grant an increase in the hourly rate, it is counsel's responsibility to make sure that experts understand that they could be held to the presumptive maximum by the Judicial Council. Fees and expenses established for experts and investigators may not be exceeded without prior approval of the court and are subject to Judicial Council approval.

The court will explore with counsel what mental health and other examinations were conducted at the state court level, if relevant to the case. If additional examinations are requested, counsel should provide justification in the supporting Phase II declaration, and counsel should be prepared to discuss this justification at the CMC for Phase II. The court will also explore with counsel

what investigation was done at the state level, and counsel should be prepared to state what further investigation will be needed in connection with each issue.

The results of this CMC are entered into case-management orders, one under seal served only on petitioner's counsel, and one publicly filed served on all parties. The publicly filed order should contain the due date for the answer or other responsive pleading, the date for the next CMC, if any, and any other decision made at the conference. The order filed under seal should discuss the approved Phase II budget, as well as set the due date for submission of the Phase III case-management plan and budget.

Although rare, some cases may be suitable for settlement at this stage, and the court may want to consider whether to explore this possibility with counsel.

As Phase II progresses, the court will monitor counsel adherence to the budget and established deadlines. The court's designated CJA budget administrator will compare actual expenses to budgeted amounts. Attorneys must not exceed the amounts established in the budget. It is counsel's responsibility to seek a modification of the budget before incurring any unauthorized fees or expenses. The court also may require periodic conferences or status reports.

Phase III: Exhaustion, Motion for Evidentiary Hearing, Briefing of Claims

Counsel should file the proposed Phase III budget within 20 days of the filing of the attorney general's answer or other responsive pleading or, if another CMC is scheduled, at least one week before the date set for the Phase III CMC. At the Phase III CMC, the court will address the following:

- researching and briefing exhaustion and procedural default, if appropriate;
- briefing the claims;
- preparing and arguing a motion for evidentiary hearing;
- preparing motions for discovery or joint discovery stipulations for approval by the court;³ and
- discovery, if granted.

In some districts, the attorney general will seek summary judgment at this stage. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts allows flexibility in the court's approach. Often, a motion for summary judgment will not provide assistance in resolving issues and will result in unnecessary expenditures of time. To expedite review of the case, the court should first determine the need for factual development of specific claims, which could be accomplished through discovery or at the evidentiary hearing. Claims that do not require factual development after full briefing will be decided on the merits. If an evidentiary hearing is granted, the judge should consider only one round of briefing after the evidentiary hearing is completed.

3. The court should expect that the vast majority of discovery disputes can be resolved by the parties, and the discovery agreed on by the parties can be submitted to the court by way of a joint stipulation. Using a joint stipulation to settle discovery issues will conserve time and cost, but the court should review all discovery stipulations and requests to ensure that the discovery is necessary and is accomplished in the most efficient and economical fashion. The discovery for which no agreement can be reached should be delineated in the joint stipulation, with each party setting forth its position on the proposed discovery.

The final tasks to be accomplished at this CMC are establishing deadlines for all approved activities and approving the Phase III budget. The results of this CMC are entered into case-management orders, one under seal served only on petitioner's counsel and one publicly filed served on all parties, as explained on page 5.

Phase III typically proceeds with research and briefing of exhaustion and procedural default, if raised. If the case is directed back to state court for exhaustion, the federal court process is usually dismissed or held in abeyance until the case returns. If held in abeyance, counsel should be directed to provide brief status reports on the progress of the case as it proceeds through state court and should be paid for the small amount of time this task should take. The court should expect that no other fees or expenses will be incurred while the case is being held in abeyance. However, there may be rare instances (*e.g.*, if counsel visits petitioner regarding actions of the federal court) where application for funds is appropriate. The court should advise counsel to seek funds from the state court for fees and expenses incurred during this period.

Upon return from exhaustion, or if exhaustion has been waived, an amended petition will be filed (or deemed filed upon denial of the state petition if petitioner already has lodged a proposed amended petition), discovery may be conducted, and, if necessary, a motion for evidentiary hearing may be researched, briefed, filed, and argued. The court will rule on the motions for evidentiary hearing and discovery. Judges are encouraged to explicitly allocate time for considering the motions for further evidentiary development to ensure that decisions are rendered in a timely manner. If any motion is granted, the court should set a date for a Phase IV CMC and direct counsel to prepare and submit a Phase IV case-management plan and budget.

During Phase III, the court monitors counsel's adherence to established deadlines and the approved budget. As noted previously, vouchers should be regularly submitted in accordance with the court's orders. Prompt voucher processing by the court is essential to ensure continuing progress in the case. Counsel should again be reminded not to exceed the authorized budget without first seeking an amendment to the budget.

Phase IV: Discovery, Evidentiary Hearing, Final Briefing

In Phase IV several CMCs may be necessary to serve as both budgeting and management tools. Phase IV CMCs are used to determine the time and resources needed to prepare for and conduct an evidentiary hearing and discovery, if granted. These CMCs are an opportunity for the court to fully explore remaining areas of dispute and ascertain what items the attorney general may be willing to admit. After the court has resolved any evidentiary issues, the CMC presents an opportunity for the court to suggest the possibility of settlement discussions with another judicial officer, if both parties are interested in exploring resolution of the case. Should settlement or other agreed-to disposition fail to materialize, the court will determine how evidence will be received. To reduce costs, courts may wish to consider handling appropriate issues on the papers, scheduling oral presentations only as needed. The court also may consider allowing direct testimony by introduction of a witness's declaration and conduct depositions in lieu of testimony. The court should be watchful for the premature and unnecessary preparation of expert declarations. Any residual discovery disputes should be resolved at this point.

The court should consider apportionment of discovery costs (which would be included in the budget) between petitioner and respondent. Pursuant to Rule 6 of the Rules Governing Section

2254 Cases, respondent may be ordered to pay travel and subsistence expenses and fees for petitioner's counsel to attend depositions requested by respondent. In addition, in accordance with Federal Rule of Civil Procedure 26(b)(4)(C), respondent may be ordered to pay the petitioner's retained expert a reasonable fee for time spent in responding to discovery. These hours should not be included in the budget. Because the budget order is a confidential document served on petitioner's counsel only, the court should issue a companion order that is served on both parties indicating any resolutions as to the apportionment of costs.

Strickland experts are often requested in Phase IV but before authorization the request should be carefully evaluated to determine the subject matter of the expert's proposed testimony and whether the testimony is truly needed. The court should limit record review by the *Strickland* expert to that necessary for the formulation of the expert's opinion on the subject area authorized by the court. For example, a *Strickland* expert would normally need to do little if any record review in order to assist the court in establishing the standards adhered to by competent trial counsel in the local community at the time of trial. The court should determine whether any witnesses should be considered fact witnesses and, if so, should order that travel and other expenses shall be paid by the U.S. Marshal's Office pursuant to 18 U.S.C. § 1825(b) and not included in petitioner's budget.

During Phase IV, the court should determine the amount of time and resources needed for post-hearing briefing and set deadlines accordingly. This determination, however, generally follows the presentation of evidence (by live testimony and deposition or declaration testimony). The results of all CMCs are entered into the case-management orders.

Phase IV continues with preparation for the evidentiary hearing. The court should apply the concepts outlined in Federal Rule of Civil Procedure 16 and encourage the use of informal discovery devices, such as meet-and-confer conferences between the parties. Discovery is conducted (if required or authorized), and counsel prepares witnesses. The evidentiary hearing is conducted followed by post-hearing briefing and, if necessary, any post-hearing motions. The court should assess viable issues and request lawyers to limit briefing to these issues.

After careful review of the pleadings, the state record, all properly admitted evidence, and the argument of counsel for the parties, the court will issue a memorandum order and decision on the merits of the petition. This is a time-consuming process, as are all merits determinations in capital habeas cases. A time guideline for issuing opinions should be established by the district court. Traditional practice is that once the final merits ruling is entered, a notice of appeal and request for a Certificate of Appealability (COA) are prepared and filed. However, it is generally believed that a better practice is for the COA to be addressed at the time of the decision on the merits, with notice to counsel before briefing, requiring few, if any, additional hours by either counsel or the court. The recommendation is based on the assumption that the judge is most knowledgeable about the issues in the case at the time of the final judgment and can therefore make the most reasoned decision about what issues are appropriate for a COA.

The judge is encouraged to grant or deny the COA in the final order or draft the COA at the time of the merits order. The draft COA could be finalized after the request is ultimately submitted. Generally, large budget requests for COAs should be denied, and the attorneys should be informed that significant briefing supporting a COA request is not needed.

Motions for reconsideration of the final judgment are also to be discouraged. If one is filed and the court issued a COA at the time of final judgment, a timing problem may result, as the appli-

cation for an expanded COA would be due before the notice of appeal is due.⁴ The issue could be resolved if the petitioner files a request for an extension of the Rule 22(d) deadline.

IV. Conclusion

It is hoped that this case-management guide will assist judges in managing capital habeas cases while allowing them to control associated case costs. Within the basic framework of the budgeting process, creative and individual approaches to case management are encouraged. Ideas for effective case management are welcomed and should be communicated to the Circuit Executive's Office to be shared with other members of the judiciary.

4. Pursuant to Ninth Circuit Rule 22(d), if the petitioner wishes to seek an expanded certificate of appealability in the Ninth Circuit, he or she has to file a motion with the Ninth Circuit within thirty-five days of the district court's entry of its order denying a certificate of appealability. But if the petitioner files a motion for reconsideration of the denial of the petition, he or she would not be required to file a notice of appeal until thirty days from the date of the denial of the motion to reconsider. Thus, the notice of appeal would not be due until after the application for an expanded certificate of appealability is due, which creates the problem.